Supreme Court, U.S.
FILED
AUG 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1956

In the Supreme Court of the United States

OCTOBER TERM, 1990

DONALD WEIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly denied petitioner's application for entry of judgment *nunc pro tunc*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 898 F.2d 198. The order of the district court (Pet. App. 10a-11a) is unreported. A related opinion of the court of appeals (Pet. App. 12a-31a) is reported at 829 F.2d 166.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1990. The petition for a writ of certiorari was filed on June 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the early 1980s, Edward Markowitz was the managing general partner of TMG II, a limited partnership. Markowitz was also the president and sole shareholder of Monetary Groups, Ltd. (MGL), a corporation that served as general partner for another limited partnership, TMG Associates. Under Markowitz's direction, TMG II and TMG Associates created marketable tax losses through sham transactions. As a result, the Internal Revenue Service launched a criminal investigation of Markowitz. Petitioner, a general partner of TMG II, cooperated with the government in this investigation. In November 1983, as a result of the investigation, Markowitz and MGL resigned as general partners. Pet. App. 13a-15a.

In December 1983, petitioner, on behalf of TMG II, filed an action in the United States District Court for the District of Columbia against Markowitz, his associate Debra Strahan, MGL, and other corporations controlled by Markowitz. Petitioner alleged that the defendants "had diverted partnership property and business to themselves in violation of state and federal law." Pet. App. 13a. The complaint sought equitable and monetary relief. Between December 1983 and March 1984, as a result of the pending criminal investigation, Markowitz filed three separate motions in the district court to stay the civil action. The district court denied each motion and scheduled trial for October 1984. *Id.* at 7a, 16a.

In May 1984, the United States Attorney for the Southern District of New York filed a motion on behalf of the government to intervene in the pending civil action for the limited purpose of staying discovery. The United States Attorney asserted that "[pe-

titioner] and his counsel were intentionally misusing discovery to get an illicit preview of the [criminal] investigation, and disclosed that all of the parties to the civil suit were subjects of that same investigation." Pet. App. 17a. The government supported its motion with an affidavit of an Assistant United States Attorney served on opposing counsel and a second affidavit, filed *ex parte* without notice to opposing counsel. The district court temporarily stayed further discovery on May 7, 1984. *Ibid.*[1]

On May 15, after a hearing, during which counsel for TMG II presented its objections, the district court continued the stay of discovery. On May 22 and 23, the government filed two additional *ex parte* affidavits, which the district court placed under seal.[2] In June, the court entered an order continuing the stay of discovery until September 1984. Pet. App. 18a.[3]

In January 1985, several months after the stay had expired, the Internal Revenue Service made an assessment against Markowitz in the amount of $5,409,950.73 for unpaid income taxes and filed a

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[1] Several days later, the Wall Street Journal reported the contents of the *ex parte* affidavit, which had been mistakenly put in the public record. On the government's motion, the court promptly placed that affidavit under seal. Pet. App. 17a-18a.

[2] Petitioner asserts that "the Government now knows—that much of the contents of its *ex parte* communications to the Court was patently false." Pet. 17. The record contains no support for this claim, and petitioner cites none.

[3] The government did not seek any further extensions of the stay. Nor did the government participate in the pending civil actions against Markowitz and his co-defendants. Pet. App. 18a-19a.

notice of federal tax lien with the District of Columbia Recorder of Deeds. Pet. App. 8a, 19a.[4]

In April 1985, the parties reached a tentative settlement of the pending civil action. Under that agreement, Markowitz and the corporate defendants agreed to a money judgment of approximately $900,000; each of the limited partners would be personally notified of the proposed settlement and given an opportunity to object. Pet. App. 19a-20a.

On April 25, Markowitz pleaded guilty to criminal tax fraud charges filed in the Southern District of New York. A copy of that criminal information, together with the tentative settlement of the civil action, was sent to each of the limited partners. A majority of those partners opposed the settlement. Nonetheless, the district court later entered judgment approving the settlement on August 30, 1985. Pet. App. 8a, 19a-20a.

2. Petitioner challenged that judgment on appeal, contending, among other things, that the district court erred in granting the government's motions for a stay based on *ex parte* submissions. In particular, petitioner claimed that the "stays * * * resulted in a one year delay of trial that permitted the IRS to file tax liens against Markowitz [and others] before [petitioner] could secure a final decree and enforce a judgment lien against them." Pet. App. 28a. Petitioner therefore requested that "relief in TMG II's favor be entered *nunc pro tunc* to October 26, 1984, the scheduled concluding date for the trial on the merits * * *." *Id.* at 28a-29a.

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[4] The IRS later took similar action with respect to the corporations Markowitz owned and controlled. Pet. App. 8a, 19a.

The court of appeals substantially affirmed the district court's judgment. Pet. App. 12a-31a. In so ruling, the court also determined that it "need not attempt to unravel the complex web of facts concerning the propriety of the stays and *ex parte* communications when the only real relief available to [petitioner] is *nunc pro tunc* entry of the settlement order." *Id.* at 29a n.17. Since the government was "not a party to this appeal and therefore [could not] defend its interests," the court concluded, it needed to remand the case to the district court for a determination of "whether the entry of judgment *nunc pro tunc* for TMG II is appropriate." *Id.* at 30a.

3. On remand, the district court denied petitioner's application for entry of judgment *nunc pro tunc*. Pet. App. 32a-33a; see *id.* at 10a-11a. The court found that petitioner had failed to show that there was "a causal connection between the four-month stay [obtained by the government] and the priority which the Government now has for its lien." *Id.* at 32a. In addition, the court determined that the government's lien priority was inevitable. As the court explained, "the imminence of the [scheduled October 1984] trial date and or the entry of settlement would have concentrated the government's mind to where it would have effected its assessment and accompanying lien before the judgment was entered."

4. The court of appeals affirmed. Pet. App. 1a-9a. It recognized that "[*n*]*unc pro tunc* relief has been granted only in a limited number of circumstances, where its entry is necessary to avoid, and does not create, an injustice at the hands of the court itself." *Id.* at 5a.[5] Here, the record showed that petitioner

[5] The court of appeals pointed out that "justice here requires, at most, only that [petitioner] neither be hurt nor

> proffered insufficient reasons to believe that if the original trial schedule had been followed, the problems and delays that actually arose once the stay expired and the litigation was resumed would not still have arisen and thus caused the judgment in his favor to be entered after the Government's lien had attached.

Id. at 7a. As the court explained, this was a "persuasive" reason for denying petitioner's requested relief:

> The overwhelming fact is that the stay was in force only from May 7 until September 14, just over four months, whereas the district court entered the settlement on August 30, 1985, almost one full year after the stay had expired (and more than seven months after the Government filed its tax lien). We do not think it the more likely that, but for the stay, entry of a settlement would have come between May and October when in fact, once the clock started to run again with the expiration of the stay, it took the parties a year to accomplish that result.

Id. at 8a-9a.

Moreover, the court of appeals pointed to a "second conclusive" reason for rejecting petitioner's claim. Pet. App. 7a. The record showed that the government was closely monitoring developments in the pending civil action and thus could have filed its

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helped by the stay." Pet. App. 6a. For that reason, the court concluded that "such matters as TMG II's assistance to the Government during its investigation and the Government's alleged misconduct in obtaining the stay upon the basis of an *ex parte* submission to the court * * * [were irrelevant] to the question whether the stay enabled the Government to gain temporal priority for its tax lien." *Ibid.*

tax lien as soon as it learned of a proposed settlement, a point in time which would have assured the government's lien priority. *Id* at 9a. The court thus concluded that petitioner "has failed to demonstrate that, but for the stay, TMG II's claim against Markowitz would have had priority over that of the Government." *Ibid.* In these circumstances, the court held, "[t]he interests of justice would not be served * * * by entry of [petitioner's] judgment *nunc pro tunc.*" *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 20-23) that the courts below erred in refusing to enter judgment *nunc pro tunc* in order to defeat the government's lien priority. As leading commentators have explained:

> Cases involving an entry of judgment nunc pro tunc generally break down into two groups: (1) those in which one of the parties died after the submission of the case to the lower court for decision, but before the actual rendition of judgment; and (2) those in which a previous judgment has in fact been rendered by the lower court, but the clerk has failed to perform the ministerial function of entry.

6A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 58.08, at 58-76 (2d ed. 1989); see *Cuebas Y Arredondo* v. *Cuebas Y Arredondo*, 223 U.S. 376, 390 (1912); *Mitchell* v. *Overman*, 103 U.S. 62, 64-65 (1881). Under these governing standards, petitioner plainly was not entitled to an entry of judgment *nunc pro tunc*. See, *e.g.*, *Cyrpress Barn, Inc.* v. *Western Electric Co.*, 812 F.2d 1363, 1364 (11th Cir. 1987).

To be sure, federal courts have carved out a narrow exception to these standards in order to reach

an equitable result in bankruptcy cases, but only in "extraordinary circumstances where [entry judgment *nunc pro tunc*] will not prejudice any party or frustrate the purposes of the Bankruptcy Code." *In re Auto-Train Corp.*, 810 F.2d 270, 275 (D.C. Cir. 1987); see *In re Triangle Chemicals, Inc.*, 697 F.2d 1280, 1282 (5th Cir. 1983). Petitioner may not find a safe harbor in that narrow exception where, as here, entry of judgment *nunc pro tunc* would prejudice third parties. See 6A J. Moore & J. Lucas, *supra*, ¶ 58.08, at 58-78.

Moreover, the record confirms that petitioner failed to establish any entitlement to the extraordinary relief sought. The district court did not enter judgment until approximately one year after the stay expired. And the delay in entering that judgment was scarcely attributable to the four-month stay obtained by the government. To the contrary, settlement discussions lasted at least two months and the limited partners' rejection of the settlement caused a further four-month delay. Moreover, given the government's monitoring of the civil action, "the imminence of * * * the entry of settlement would have concentrated the government's mind to where it would have effected its assessment and accompanying lien before the judgment was entered." Pet. App. 32a. Accordingly, as the court of appeals correctly determined, since "TMG II's claim would not have had priority over that of the Government absent a stay, there is no reason why it should have priority merely because the Government obtained a stay." *Id.* at 6a.

2. Petitioner also contends that the government's "communications made below to the District Court—from a nonparty and without prior notice to opposing

counsel—are beyond the pale of any authorized exception to the bar on *ex parte* contracts." Pet. 17; see Pet. 14-20. This case, however, does not present an occasion to address that issue. The court of appeals expressly declined to consider that contention, recognizing that it was not "relevant to the question whether the stay enabled the Government to gain temporal priority for its tax lien." Pet. App. 6a. Petitioner offers no persuasive reason for this Court to consider that question in the first instance.

In any event, petitioner's claim is groundless. Here, the government submitted affidavits *ex parte* in order to avoid compromising an ongoing criminal investigation. Federal courts have long sanctioned such a procedure. See, *e.g.*, *In re Special September 1978 Grand Jury*, 640 F.2d 49, 56-57 (7th Cir. 1980); *United States* v. *Cortese*, 614 F.2d 914, 921-922 (3d Cir. 1980); see also *United States* v. *Nixon*, 418 U.S. 683 (1974).[6] Moreover, the record shows that the government's submission did not prejudice petitioner. See, *e.g.*, *Aiken County* v. *BSP Division of Envirotech Corp.*, 866 F.2d 661, 677-678 (4th Cir. 1989); *Simer* v. *Rios*, 661 F.2d 655, 679 (7th Cir. 1981), cert. denied, 456 U.S. 917 (1982). Petitioner received a less detailed version of the first *ex parte* submission and had access to those parts of the submission made public by the Wall Street Journal. See note 1, *supra*. And petitioner, represented by counsel, appeared at the hearing on the government's

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[6] Petitioner's citations (Pet. 18-20) to *Golden Pacific Bancorp.* v. *Clarke*, 837 F.2d 509 (D.C. Cir. 1988), and *Texas* v. *New Mexico*, 485 U.S. 388 (1988), are beside the point. The latter case did not involve any issue regarding *ex parte* communications; the former case, as petitioner concedes, "did not * * * reach the *ex parte* contacts issue." Pet. 18.

motion for stay. On this record, the court of appeals thus correctly characterized petitioner's assertion of prejudice as "a broadside that lacks any factual support." Pet. App. 7a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1990

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* The Solicitor General is disqualified in this case.

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